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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1625

JAMES K. MAYES, MOODY WADE, MIKE MOORE and INDEPENDENT SCHOOL DISTRICT NUMBER 20 OF MUSKOGEE COUNTY, OKLAHOMA,
Petitioners,

VERSUS

JON TOM STATON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

KAY WILSON, JR.
319 Court Street
Muskogee, Oklahoma 74401
Counsel for Respondent

June, 1977

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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SUMMARY OF RULINGS

At the time of Dr. Staton's dismissal 70 Oklahoma Statutes, § 6-103, stated in part:

> ". . . Provided in cases involving incompetency or neglect of duty, the decision arrived at a said hearing shall be final and in those involving moral turpitude an appeal may be taken to the district court of the county."[1]

[1] 70 Oklahoma Statutes, § 6-103 has since been amended to correct this limitation.

On the same evening that Petitioner Mayes was sworn in as a member of the Board of Education, Petitioners passed the motion: "That Jon Tom Staton be dismissed . . . because of wilful neglect of duty and incompetence." A notice was sent to respondent which carried no further specificity of the charges. A farcical hearing was held and followed by a motion for dismissal that made no reference to even a verdict much less the charges or findings.

Respondent filed a complaint that among other things included a questioning of the constitutionality of old 70 Oklahoma Statutes, § 6-103, and the allegation that *no evidence* was produced at the hearing to support the charges. The District Court ruled out both contentions at pretrial, stated during the hearing:

> ". . . I don't propose to be a tribunal as to whether the plaintiff should stay or not stay. I don't think that is my office. I'm not reviewing an administrative decision. I have here, qualifiedly, a constitutional question, as I view it, or a deprivation thereof of a state officer. This is whether they deprived the plaintiff of his constitutional rights of notice and in presenting a biased tribunal."

And finally the District Court stated in the Memorandum Opinion (Petitioners' Appendix B p. 28a):

> ". . . 42 U.S.C. § 1983 does not extend the right to relitigate in Federal Courts evidentiary questions arising in school proceedings. . . . Hence, under this case and the issues presented herein, this court will not be concerned with reference to the wisdom or merits of the discretionary decision of a majority of the Board that plaintiff was guilty as charged and should be dismissed."

The dissenting judge in the Circuit Court opinion stated (Petitioners' Appendix A p. 20a):

> ". . . the reviewing courts must examine the complete record of the administrative proceedings and determine . . . (b) whether the dismissal was justified *on the merits based on substantial evidence.*"

With this we certainly agree. We properly complained and have maintained throughout this litigation that there was no evidence to support the charges. We further are convinced that due process is denied until we know the claims (both charges and what supports them) of our opponents and have a chance to rebut them. [We again note the dissent of the Circuit Judge (Petitioners' Appendix A p. 19a):

> ". . . we must look to the record in order to ascertain . . . whether the board rendered adequate findings of fact (or adequately stated reasons) for its ultimate decision from which state courts could, upon appeal and review, determine whether the board's decision is based on substantial evidence. . . ."]

SUBSTANTIVE DUE PROCESS

Respondent has complained, argued, and maintained during this litigation that due process was denied because:

(a) Testimony from the Board of Education revealed that Dr. Staton had never been warned of any shortcomings. *Bomar* v. *Keyes*, 162 F.2d 136 (C.A. 2d 1947), *cert. den.*, 322 U.S. 825.

(b) Petitioners still failed to give specific charges, even after objection at the administrative hearing, but specificity of charges should be automatic for due process. *Dunham* v. *Crosby*, 435 F.2d 1177 (C.A. 1970).

(c) The real reasons for dismissal were desegregation and teacher evaluation, and the administrative hearing revealed only a *post hoc* list of alleged administrative deficiencies. *Roane* v. *Callisburg Independent School District*, 511 F.2d 633 (C.A. 1975).

(d) 70 Oklahoma Statutes, § 6-103, at the time of dismissal was unconstitutional. *Goss* v. *Lopez*, 419 U.S. 565.

(e) Cause for dismissal was not shown. *Carter* v. *U. S.*, 407 F.2d 1238 (C.A. D.C. 1968).

(f) Board decision cannot cut across Constitutional guarantees without factual support. *St. Joseph Stock Yards* v. *U. S.*, 298 U.S. 38.

(g) Evidence must be clear, convincing and have rational basis. *Schneiderman* v. *U. S.*, 320 U.S. 118.

(h) Much of the evidence produced at the administrative hearing was opposed to First Amendment principles, illegal in Oklahoma and erroneous. *Cook County College Teachers Union* v. *Byrd*, 456 F.2d 882 (C.A. 7th 1972).

(i) Evidence showed no adverse effect on the operation of the schools. *Pickering* v. *Bd. of Education*, 391 U.S. 563.

(j) There was no finding of fact after the administrative hearing, and the District Court refused to even consider the sufficiency of the evidence. *Russo* v. *Central School District*, 469 F.2d 623 (C.A. 2d 1972).

(k) Lack of fact finding is comfortable "bed partner" for prejudice. *Pittsburg S. S. Co.* v. *NLRB*, 167 F.2d 126 (C.A. 6th 1948).

(l) Notice in only conclusory terms, coupled with no finding of fact, creates an impossibility for the appellate court. *Takeo Tadano* v. *Manney*, 160 F.2d 665 (C.A. 9th 1947).

The Circuit Court made a most critical conclusion related to these contentions (Petitioners' Appendix A pp. 12a, 13a):

> "On the record as a whole we are left with the firm conviction that this board decision cannot stand and that a mistake was made in the ruling denying the due process claim. *Zenith Corp.* v. *Hazeltine*, 395 U.S. 100, 123."

Respondent had a monumental task in appealing the factual case to the Circuit Court in light of the District Court's lack of recognition of its proper course of action. *Shachtman* v. *Dulles*, 225 F.2d 938 (C.A. D.C. 1955). Concurring Opinion at 944. However, the Circuit Court found an impossible task as it observed the record in light of the mandate of Rule 52, F.R.Civ.P. A notice in only conclusory terms, a mass of nebulous testimony, no finding of fact, strong allegations of First Amendment infringements and a denial of both substantive and procedural redress by the District Court forced them to invoke the "clearly erroneous" standard. *United States* v. *United States Gypsum*, 33 U.S. 364, 395.

The Circuit Court's decision to remand to the Board of Education is imperative. The appellate courts cannot assume specific charges or findings for the Board of Education. *Johnson* v. *Branch*, 364 F.2d 177 (C.A. 4th 1966).

This point alone was sufficient to demand the Circuit Court's disposition of the case. Bias or prejudice of the tribunal might or might not be identified as the cause and still leave this deficiency in due process upon which the case would still have to turn.

NECESSITY

Respondent continues to contend that "necessity" was never an issue in this case. Dr. Staton made an appeal as provided under 70 Oklahoma Statutes, § 6-122, and a hearing date was set. This statutory process provided for a *de novo* hearing before a separate body and final appeal to the State Board of Education. Petitioners then aborted the hearing by obtaining an Attorney General's opinion that they could exclusively proceed under the old Title 70 Oklahoma Statutes, § 6-103, that provided for the board's decision on the charges of incompetency and wilful neglect of duty to be final.

The 1975 revision of 70 Oklahoma Statutes, § 6-103, has made moot any further question of its constitutionality. However, Respondent stated in the original complaint that the statute was unconstitutional. We again note a concurring thought even though it comes from the dissenting Circuit Judge's opinion (Petitioners' Appendix A p. 19a):

> "I readily agree that 70 OSA § 6-103, prior to the 1975 amendments, under which the Board proceeded in the instant case, lacked both procedural and substantive due process."

This case was not one which disqualification would have "destroyed the only tribunal with power on the premises." Petitioners revived a long hidden statute that had laid unchanged since before the days of statehood. They insisted upon the exclusive use of it to block the passageway to other statutory administrative hearing bodies with "power on the premises." It was therefore *by design, not necessity*, that Petitioners were solely in charge of Respondent's dismissal.

Petitioners inadvertently quote 70 Oklahoma Statutes, § 6-122, as it read before amendments of 1971 and 1972. The last paragraph of the statute had been changed before the dismissal of Respondent in 1973. This error is critical since the part of the statute that creates other hearing bodies with "power on the premises" is omitted in the petition. It is upon the statute, as it existed at time of Respondent's dismissal, that we base our statement that necessity was not an issue. Title 70 Oklahoma Statutes, § 6-122, as it read at the time of the 1973 Board hearing, was as follows:

> "The failure to renew a contract by the board of education of any teacher who has completed three (3) years shall not be effective, and such contract shall be renewed unless there is served on such teacher a written statement by such board containing a statement of causes for such action, which must include one of the following: immorality, wilful neglect of duty, cruelty, incompetency, teaching disloyalty to the American Constitutional system of government, or any reason involving moral turpitude. Such teacher shall be afforded an opportunity to appear before such board and confront his or her accusers, having the right to cross-examine and offer any evidence to refute the statements and a reconsideration of the action theretofore made by the board.

"Said notice of nonrenewal and the statement of causes shall be mailed to the teacher prior to the 10th of April notifying said teacher of the nonrenewal and a statement of causes. Said cause shall be set within twenty (20) days after receipt of said notice for a hearing before the board of education.

"Before final decision of the matter the teacher shall be allowed to appeal the action of the board to the Professional Practices Commission. Such commission shall allow the teacher to be heard and after reviewing the facts shall report its recommendation to the State Board of Education. Upon the receipt of the recommendation of the Professional Practices Commission, the State Board of Education, if requested by the teacher, shall fix a date, hour and place for hearing of the matter within ten (10) days and notify the teacher of such time and place. At such hearing both the teacher and the local board of education shall be advised of the action of the Professional Practices Commission and shall be allowed to be heard. Such hearing may be held in executive session if agreed on by all parties concerned.

"After review of the matter the State Board of Education shall issue its decision either confirming the action of the local board of education or issuing the finding that dismissal of said teacher was without sufficient cause and that said teacher was without fault in the premises, which decision shall be final. A finding that a teacher was dismissed without sufficient cause shall automatically extend for one year the contract of the teacher involved, during which period of time the board of education and the teacher shall negotiate in an effort to resolve their differences prior to April 10 of the succeeding year."

PETITIONERS' REASONS REBUTTED

Petitioners plead for the Court to determine the extent of the "rule of necessity," and to define the due process requirements in all similar cases. The case law shows that this astronomical task has so far evaded rigid definition. This Court has many times held that due process is a term that "negates any concept of inflexible procedures universally applicable to every imaginable situation." However, there is certainly an identifiable dividing line between the instant case and those cited by Petitioners that each have overwhelming evidence: *Brinkley* v. *Hassig*, 83 F.2d 351 (C.A. 10th 1936); *Simard* v. *Board of Education of Groton*, 473 F.2d 988 (C.A. 2nd 1973); or those where the charges were stipulated as true as in *Hortonville Joint School District Association No. 1* v. *Hortonville Education Association*, U.S. 49 L.Ed.2d 1 (1976); *Swab* v. *Cedar Rapids Community School District*, 494 F.2d 353 (C.A. 8th 1974).

Petitioners' third contention is erroneous wherein they assume that statutes in other states would be affected. The test upon which the Circuit Court decided the prejudice issue does not infringe in any way upon the judicial procedures as called for in the normal investigation and prosecution set out in such statutes. The Circuit Court on page 15 of the Opinion specifically so states. The cases cited there show that the "judicial" v. "extra-judicial" test as described in footnote 10 *Withrow* v. *Larkin*, 421 U.S. 35, 50, and the cases there cited, was used by the Circuit Court. We know of no state with statutes that provide for approval of such "extra-judicial" acts as the harassment and adverse public relations campaign to which Petitioners subjected Respondent far in advance of the consideration of a hearing.

We see a totally concurring effect of the application of the Circuit Court's ruling in light of rulings in the highest courts of the states. Petitioners cite *Monahan* v. *Board of Trustees, etc. County of Fremont*, 486 P.2d 235 (Wyo. 1971), to exhibit a conflict with state rulings (page 14 of their Petition). The state court's ruling there found that biased procedures aborted due process and specifically state that they do not even try to decide whether there was good cause. That case goes much farther than the instant case since it actually turned on "judicial" acts related to the hearing procedures.

We finally notice that Petitioners now state many times that the board opposed the "policies" of the superintendent, and that there was no "personal bitterness" in the action taken by the board. First, policy making is a function vested exclusively in the school board as noted by petitioners on page 13 of the petition. Second, the board minutes in the record, the administrative hearing record and the trial court record all reveal *personal* attacks on the Respondent by Petitioners. Third, there is not one scintilla of evidence that the superintendent's policies, procedures or practices were ever questioned, much less criticized privately or publicly by Petitioners. At the oral argument before the Circuit Court, counsel for Petitioners was specifically asked three times by Judge William E. Doyle why Respondent was fired. We still do not know. The Circuit Court noted that the notice was not adequate to satisfy due process but ruled that Respondent's objection to the notice at the administrative hearing came too late (Petitioners' Appendix A pp. 6a through 8a). Since there has been *no* finding of facts at any stage of the case, Respondent still is entirely in the dark,

to this day, as to what Petitioners allege were the reasons for his dismissal. We realize the need for Petitioners to establish that the reasoning was based on "policy" in light of the rulings in recent cases. However, we assert that this vague and conclusory allegation is made much too late for consideration.

CONCLUSION

Both the majority and dissenting opinions from the Circuit Court held that due process required at least some degree of fact finding. More than that, Respondent alleged in the complaint that there was no evidence to support the charges. Due to the difficulty that the courts have found in reaching and identifying the issue, this case is now in the fifth year of duration. We feel that solution properly may be reached through remand rather than appeal to a higher court. *Laney* v. *Holbrook*, Fla., 8 So.2d 465:

> "In the state of the record in which it appeared in the Circuit Court the judgment, if it could be called a judgment, or order of the County Board of Public Instruction should have been quashed and the cause remanded to the Board with instructions to make findings of fact with sufficient definiteness to advise the accused as to what facts the Board found sufficiently proven to substantiate the charges which would warrant the forfeiture of his position as Principal of the Public Schools of the City of Apopka in Orange County, Florida.
>
> "Having reached this conclusion, it would be improper for us at this time to express any opinion as to the sufficiency of the evidence to support any of the charges or to express any opinion as to whether or

not the charges, if found to be based on fact, are sufficient to warrant the expulsion of the plaintiff-in-error as Principal of the Public Schools, supra."

The Tenth Circuit Court concurred by remanding the instant case to the Board of Education via the trial court.

Respectfully submitted,

KAY WILSON, JR.
319 Court Street
Muskogee, Oklahoma 74401

Counsel for Respondent

June, 1977

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the foregoing instrument were served upon:

Michael S. Yaroschuk
918—16th Street, N.W.
Washington, D. C. 20006,

attorney for Petitioners, by mailing such true and correct copies, postage prepaid, this ..... day of June, 1977.

KAY WILSON, JR.
Attorney for Respondent